89-546

No. _____

Supreme Court, U.S.
FILED
SEP 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 1989

JACK J. MORRIS,

Petitioner

v.

CAROL WACKER AND
THE SCHOOL DISTRICT OF PHILADELPHIA,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER a motion for reconsideration of an order denying a prevailing civil rights plaintiff's request for attorneys' fees and costs is a motion to "alter or amend a judgment" within the meaning of Fed. R. Civ. P. 59(e) so as to render a notice of appeal of the denial of the original request for attorneys fees ineffective under Fed. R. App. P. 4(a)(4) in view of established precedent holding that the original request is not a motion to alter or amend under either rule.

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IN THE

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NO.

OCTOBER TERM, 1989

JACK J. MORRIS

Petitioner

v.

CAROL WACKER AND
THE SCHOOL DISTRICT OF PHILADELPHIA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Jack J. Morris, petitioner, requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on May 18, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit dated May 18, 1989, is unreported and is printed in Appendix A hereto. The judgment of the United States Court of Appeals for the Third Circuit is presented in Appendix C hereto.

The following opinions and orders of the District Court are printed in Appendix B hereto:

1. Judgment of the United States District Court for the Eastern District of Pennsylvania dated November 1, 1988;

2. Opinion dated December 19, 1988 denying the motion for award of attorneys' fees and costs;

3. Order of December 19, 1988 denying the motion for ward of attorneys' fees and costs;

4. January 10, 1989 denial of plaintiff's motion for reconsideration of denial of motion for award of attorneys' fees and costs.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 18, 1989. (Appendix C). A timely Petition for Rehearing was denied on June 20, 1989. (Appendix C.) The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTE AND RULES INVOLVED

42 U.S.C. §1988, see Appendix.

Fed. R. Civ. P. 59(e):

> (e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Fed. R. App. P. 4(a)(4):

> (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed with the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

STATEMENT OF THE CASE

Petitioner, Jack J. Morris, a school teacher employed by the Respondent School District of Philadelphia ("School District"), instituted an action in the United States District Court for the Eastern District of Pennsylvania on February 28, 1986 against the School District and various of its officials[1] under 42 U.S.C. §1983 to recover damages resulting from the violation of his First Amendment rights. On November 1, 1988, the Clerk of the Court entered judgment in favor of Mr. Morris based upon his acceptance of the School District's and Dr. Wacker's offer of judgment pursuant to Fed. R. Civ. P. 68 "in the amount of $34,000.00 together with the costs accrued to this date." On November 11, 1988, Mr. Morris moved for an award of counsel fees and costs. The District Court, by Judge Joseph McGlynn, Jr., denied the motion on December 19, 1988.

---

1. The officials named were Constance Clayton, Superintendent, Herman Mattelman, President of School Board and Carol Wacker, principal of George Washington High School. By stipulation, defendants Clayton and Mattelman were dropped from the case.

On December 30, 1988, Petitioner filed a Motion for Reconsideration of the December 19, 1988 Order. Thirty days thereafter, on January 9, 1989, petitioner filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit from the December 19, 1989 Order. The next day, January 10, 1989, the District Court denied Petitioner's Motion for Reconsideration.

By opinion dated May 18, 1989, the United States Court of Appeals for the Third Circuit concluded that the Notice of Appeal was of no effect under Fed. R. App. P. 4(a)(4) since the Motion for Reconsideration was pending at the time that the Notice of Appeal was filed. The Third Circuit reasoned that "a motion for reconsideration" is a "motion to alter or amend under Fed. R. Civ. P. 59(e)'." In view of the fact that no Notice of Appeal was filed after the motion for reconsideration was decided on January 10, 1989, the Third Circuit dismissed the appeal. On May 31, 1989, petitioner filed a Petition for Rehearing of the Third Circuit's decision, which was denied on June 20, 1989. Petitioner seeks this Court's review of the Third Circuit's June 20, 1989 decision.

REASONS FOR GRANTING THE WRIT

The issue in this case involves the appropriate interpretation of Rule 59(e) of the Federal Rules of Civil Procedure as incorporated by Rule 4(a)(4) of the Federal Rules of Appellate Procedure. The Court of Appeals' interpretation conflicts with decisions of this Court and if not reversed, would have a detrimental impact on prevailing parties who seek attorneys' fees under the Civil Rights Attorneys' Fees Act, 42 U.S.C. §1988.

This Court clearly pronounced in *Buchanan v. Stanships, Inc.*, 485 U.S. 285 (1988), that a motion for costs was not a motion to alter or amend a judgment under Fed. R. Civ. P. 59 (e). This Court had previously held in *White v.*

New Hampshire Dept. of Empl. Security, 455 U.S. 445 (1982), that Rule 59(e) was inapplicable to request for attorneys' fees under the Civil Rights Attorneys' Fees Act because such motions do "not imply a change in the judgment, but merely seek[s] what is due because of the judgment." 455 U.S. at 452, quoting *Knighton v. Watkins*, 616 F.2d 795, 797 (5th Cir. 1980) (footnote omitted). Thus, the petitioner's motion for an award of attorneys' fees and costs was not one described by Rule 59(e) and his appeal of the district court's denial of the motion within thirty days was timely under Rule 4 of the Federal Rules of Appellate Procedure.

The Court of Appeals departed from this Court's interpretation in *White* by deciding that the petitioners' motion for reconsideration of the denial was, nevertheless, a motion to alter or amend a judgment under Rule 59(e). It defies all principles of legal reasoning to conclude that by requesting the district court to reconsider its denial of an attorneys' fee award a prevailing party seeks to alter or amend a judgment under Rule 59(e) when that party's initial request for the award is deemed to fall outside the rule. Just as the initial request for an award does not imply a change in the judgment, neither can a second request imply that change.

The decision by the Court of Appeals has produced the harsh consequence predicted by this Court in *White* if Rule 59(e) were to be applied to Section 1988 fee requests. 455 U.S. at 452. The petitioner will be foreclosed from appealing the district court's refusal to award any attorneys' fees where he has prevailed on his effort to recover damages for the violation of his First Amendment Rights.

CONCLUSION

For the foregoing reasons, petitioner requests this Honorable Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

JEFFREY L. PETTIT, ESQUIRE
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APPENDIX A

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1. Judgment of the United States District Court for the Eastern district of Pennsylvania dated November 1, 1988; 4a

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3. Order of December 19, 1988 denying the motion for award of attorneys' fees and costs; 7a

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1024

JACK J. MORRIS,

Appellant,

vs.

CAROL WACKER AND
SCHOOL DISTRICT OF PHILADELPHIA,

Appellees.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 86-1189)
District Judge: Honorable Joseph L. McGlynn, Jr.

Submitted under Third Circuit Rule 12(6)
May 16, 1989
Before: GIBBONS, *Chief Judge,*
MANSMANN and ALDISERT, *Circuit Judges.*
(Filed: May 18, 1989)

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

The question for decision is whether this appeal was timely filed. We hold that it was not and, therefore, dismiss the appeal for want of jurisdiction.

This case began in 1986 when Jack Morris brought a Section 1983 action against the School District of Philadelphia and Dr. Carol Wacker ("appellees") for alleged violation of his first amendment rights. On November 1, 1988, judgment was entered against the appellees based on Mr. Morris' acceptance of an Offer of Judgment. *See* Rule 68, F.R. Civ. P. Thereafter, on November 11, 1988, Mr. Morris filed a motion for award of attorney's fees and costs. This motion was denied on December 19, 1988, and entered and mailed to the parties on December 20, 1988. Appellant then filed a motion for reconsideration on December 30, 1988.

On January 9, 1989, while the motion for reconsideration was still pending, the appellant filed a notice of appeal from the December 19, 1988, order denying the award of attorney's fees and costs. The district court filed an order denying the motion for reconsideration on January 10, 1989. The order of denial was entered on Janaury 11, 1989.

Rule 4(a)(4) of the Federal Rules of Appellate Procedure controls:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: . . . (iii) under Rule 59 to alter or amend the judgment; . . . the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required.

Rule 4(a)(4), F.R. App. P.

The law in this court is that a motion for reconsideration is a "motion to alter or amend under Fed. R. Civ. P. 59(e)." *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81, 83 n.2 (3d Cir. 1987). Therefore, the notice of appeal filed prior to January 11, 1989 had no effect. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); Rule 4(a)(4),

F.R. App. P. Because no subsequent notice of appeal was filed, the appeal was not timely.

Accordingly, the appeal will be dismissed for lack of jurisdiction.

TO THE CLERK:

Please file the foregoing opinion.

_____

Circuit Judge

APPENDIX B

IN THE
United States District Court
FOR THE
Eastern District of Pennsylvania

JACK MORRIS	:	CIVIL ACTION
v.	:	
SCHOOL DISTRICT OF PHILADELPHIA and CAROL WACKER	:	NO. 86-1189

ORDER

BEFORE McGLYNN J.

AND NOW, this 1st day of November, 1988, in accordance with offer of judgment and acceptance of offer of judgment it is

ORDERED that judgment is entered in favor of Jack Morris and against School District of Philadelphia and Carol Wacker, in the sum of $34,000.00.

ATTEST:

or

BY THE COURT:

BY: _____

Judge

_____

Clerk of Court

ENTERED: November 1, 1988

IN THE
United States District Court
FOR THE
Eastern District of Pennsylvania

JACK MORRIS	:	CIVIL ACTION
	:	
v.	:	
	:	
SCHOOL DISTRICT OF PHILADELPHIA and CAROL WACKER	:	NO. 86-1189

MEMORANDUM

BEFORE McGLYNN J. December 19, 1988

Pursuant to Fed. R. Civ. P. 68, defendants made an Offer of Judgment "in the amount of $34,000 together with costs accrued to this date," which the plaintiff accepted. This is the same amount previously offered in settlement but the settlement specifically covered attorney's fees and costs. What happened in the meantime is that plaintiff backed out of the settlement before the School Board had formally approved it and the plaintiff also discharged his lawyers, who recommended acceptance of the settlement.

As used in Fed. R. Civ. P. 68, the term costs include attorneys' fee awards to a prevailing party in 42 U.S.C. §1983 actions. *Marek v. Chesny,* 473 U.S. 1 (1985).

The use of the language "together with costs" creates some ambiguity. However, I am satisfied that defendants intended the offer of judgment to be congruent with the offer of settlement, i.e., that is would encompass all claims including attorney's fees and expenses. I am also convinced that plaintiff, who was then acting pro se, viewed the offer of judgment in the same light because in his acceptance he

stated that he wished "to rescind my original rejection of this offer" (See document #24).

Accordingly, I conclude that the $34,000 offer of judgment included any claims for counsel fees and expenses. Counsel[1] must look to their former client for payment of the fees.

The motion for the award of counsel fees will be denied.

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1. When plaintiff backed out of the settlement contrary to counsel's recommendation, counsel filed a motion to withdraw which was granted on September 30, 1988. The offer of judgment was communicated directly to plaintiff under date of October 7, 1988 and plaintiff accepted under date of October 28, 1988. On November 11, 1988 counsel re-entered their appearance for the plaintiff and filed this petition on the same date. Given the allegations of counsel set forth in the Motion for Leave to Withdraw (See document #18), it is difficult to discern by what authority counsel have re-entered their appearance on behalf of plaintiff. *But see, Mayberry v. Walters, et al.*, No. 88-5174, slip op. (3rd Cir. Dec. 16, 1988) (permissible for fee application to be filed by attorney himeslf).

IN THE
United States District Court
FOR THE
Eastern District of Pennsylvania

JACK MORRIS	:	CIVIL ACTION
	:	
v.	:	
	:	
SCHOOL DISTRICT OF PHILADELPHIA and CAROL WACKER	:	NO. 86-1189

ORDER

AND NOW, this 19th day of December, 1988, upon consideration of the motion for award of attorney's fees and costs and the defendant's response thereto, it is hereby

ORDERED that the motion is DENIED.

BY THE COURT:

JOSEPH L. McGLYNN, JR.

IN THE
United States District Court
FOR THE
Eastern District of Pennsylvania

JACK MORRIS	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
SCHOOL DISTRICT OF PHILADELPHIA and CAROL WACKER	:	
Defendants.	:	NO. 86-1189

ORDER

AND NOW, this 10th day of January, 1989, upon consideration of the Plaintiff's Motion for Reconsideration of this Court's Order dated December 19, 1988, denying plaintiff's Motion for Award of Attorney's Fees and Costs and defendants' response thereto, it is ORDERED that the said Motion for Reconsideration is denied.

BY THE COURT:

JOSEPH L. McGLYNN, JR.

ENTERED: January 11, 1989

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1024

JACK J. MORRIS,

Appellant,

vs.

CAROL WACKER AND
SCHOOL DISTRICT OF PHILADELPHIA

Appellees.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 86-1189)
District Judge: Honorable Joseph L. McGlynn, Jr.

Submitted under Third Circuit Rule 12(6)
May 16, 1989
Before: GIBBONS, *Chief Judge,*
MANSMANN and ALDISERT, *Circuit Judges.*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on May 16, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeal be dismissed for lack of jurisdiction. Costs taxed against appellant.

Attest:

Clerk

May 18, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1024

JACK J. MORRIS,
Appellant,

vs.

CAROL WACKER AND
SCHOOL DISTRICT OF PHILADELPHIA

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge,* HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and ALDISERT* *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Chief Judge

DATED: June 20, 1989

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*Senior Judge Aldisert as to panel rehearing only.

§1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§1981–1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.